

**STATE OF SOUTH CAROLINA****(Caption of Case)****IN RE:**

Happy Rabbit, LP on Behalf of,

Windridge Townhomes, Complainant,

v.

Alpine Utilities, Inc., Respondent

**BEFORE THE  
PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA****COVER SHEET****DOCKET****NUMBER: 2008 - 360 - S**

(Please type or print)

**Submitted by:** Richard L. Whitt**SC Bar Number:** 62895**Address:** Austin & Rogers, P.A.**Telephone:** 803-251-7442508 Hampton Street, Suite 300**Fax:** 803-252-3679Columbia, South Carolina 29201**Other:** 803-256-4000**Email:** rlwhitt@alrlaw.com

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**DOCKETING INFORMATION** (Check all that apply)☐ Emergency Relief demanded in petition☐ Request for item to be placed on Commission's Agenda expeditiously**Other:** Routine

INDUSTRY (Check one)	NATURE OF ACTION (Check all that apply)		
<input type="checkbox"/> Electric	<input type="checkbox"/> Affidavit of Publication	<input type="checkbox"/> Letter	<input type="checkbox"/> Request
<input type="checkbox"/> Electric/Gas	<input type="checkbox"/> Agreement	<input type="checkbox"/> Memorandum	<input type="checkbox"/> Request for Certifica
<input type="checkbox"/> Electric/Telecommunications	<input type="checkbox"/> Answer	<input type="checkbox"/> Motion	<input type="checkbox"/> Request for Investigat
<input type="checkbox"/> Electric/Water	<input type="checkbox"/> Appellate Review	<input type="checkbox"/> Objection	<input type="checkbox"/> Resale Agreement
<input type="checkbox"/> Electric/Water/Telecom.	<input type="checkbox"/> Application	<input type="checkbox"/> Petition	<input type="checkbox"/> Resale Amendment
<input type="checkbox"/> Electric/Water/Sewer	<input type="checkbox"/> Brief	<input type="checkbox"/> Petition for Reconsideration	<input type="checkbox"/> Reservation Letter
<input type="checkbox"/> Gas	<input type="checkbox"/> Certification of Mailing	<input type="checkbox"/> Petition for Rulemaking	<input checked="" type="checkbox"/> Response
<input type="checkbox"/> Railroad	<input type="checkbox"/> Comments	<input type="checkbox"/> Petition for Rule to Show Cause	<input type="checkbox"/> Response to Discove
<input checked="" type="checkbox"/> Sewer	<input type="checkbox"/> Complaint	<input type="checkbox"/> Petition to Intervene	<input type="checkbox"/> Return to Petition
<input type="checkbox"/> Telecommunications	<input type="checkbox"/> Consent Order	<input type="checkbox"/> Petition to Intervene Out of Time	<input type="checkbox"/> Stipulation
<input type="checkbox"/> Transportation	<input type="checkbox"/> Discovery	<input type="checkbox"/> Return	<input type="checkbox"/> Subpoena
<input type="checkbox"/> Water	<input type="checkbox"/> Exhibit	<input type="checkbox"/> Promotion	<input type="checkbox"/> Tariff
<input type="checkbox"/> Water/Sewer	<input type="checkbox"/> Expedited Consideration	<input type="checkbox"/> Proposed Order	<input type="checkbox"/> Other:
<input type="checkbox"/> Administrative Matter	<input type="checkbox"/> Interconnection Agreement	<input type="checkbox"/> Protest	
<input type="checkbox"/> Other:	<input type="checkbox"/> Interconnection Amendment	<input type="checkbox"/> Publisher's Affidavit	
	<input type="checkbox"/> Late-Filed Exhibit	<input type="checkbox"/> Report	

**BEFORE**  
**THE PUBLIC SERVICE COMMISSION**  
**OF SOUTH CAROLINA**  
**DOCKET NO. 2008-360-S**

IN RE: )  
Happy Rabbit, LP on Behalf of, )  
Windridge Townhomes, )  
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Complainant, )  
v. )  
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Alpine Utilities, Inc., )  
Respondent. )  
\_\_\_\_\_ )

**COMPLAINANT'S**  
**REPLY TO RESPONDENT'S**  
**RESPONSE TO COMPLAINANT'S**  
**MOTION TO CONFORM**  
**TO PROOF**

**INTRODUCTION**

Happy Rabbit, a South Carolina Limited Partnership, on behalf of Windridge Townhomes, (hereinafter, "Happy Rabbit") filed a Complaint in this Docket on September 16, 2008. Thereafter, extensive discovery has been completed by the parties. As a result of discovery served by Complainant Happy Rabbit, and answers thereto by Alpine Utilities, Inc., (hereinafter, "Alpine"), Alpine has admitted that actual notice of Section 27-33-50, S.C Code of Laws Ann. (1976, as amended), was provided to Alpine by Happy Rabbit, on or about October 6, 2003. Alpine thereafter willfully overcharged Happy Rabbit, despite being placed on notice of Section 27-33-50, and despite Happy Rabbit's request that Alpine establish sewer utility accounts with each tenant of Happy Rabbit, as required by Section 27-33-50. Happy Rabbit filed a Motion to Conform to Proof on March 11, 2009. Alpine filed a Response to Happy Rabbit's Motion on March 20, 2009. Happy Rabbit's Reply to Respondent's Response to Complainant's Motion to Conform to Proof, follows:

**REPLY**

Complainant's Motion to Conform to Proof is still pending with the Public Service Commission of South Carolina, (hereinafter, "Commission"). Happy Rabbit believes that its Motion is meritorious and should be granted by this Commission. Rule 15(B) of the South Carolina Rules of Civil Procedure allows amendments to Conform to Proof and amendments to be within the sound discretion of this Commission. Dunbar v. Carlson, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000).

Also, the test for such amendment is prejudice to the other party, even if objected to by the other party. "If evidence is objected to at the trial on the ground that it is not within the issue made by the pleadings, **the court may allow the pleading to be amended and shall do so freely** when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense on the merits." (emphasis supplied) Pool v. Pool, 329 S.C. 324, 494 S.E.2d 820, 822 (1998).

An allegation of an improper utility relationship supports an inquiry under § 58-5-290 S.C. Code Ann. (1976, as amended). The inquiry may be broad pursuant to applicable regulations and statutes including, but not limited to, § 58-5-290, because this Commission may consider all facts which in its judgment have a bearing upon a proper determination of the question, although not set forth in the application and not within the allegations contained therein § 58-5-300 S.C. Code Ann. (1976, as amended).

This Commission has not previously required Complainants to set forth their Complaint replete with citations to statutory provisions involved. Therefore such a harsh standard should not applied to Complainant herein.

### **ALPINE CLAIMS UNFAIR PREJUDICE** **(Alpine's Section III)**

Alpine has not made even a minimal case of prejudice in this Docket. Alpine has (i) had ample opportunity to respond, (ii) in fact responded in great detail to Happy Rabbit's allegations of willful overcharge, (iii) no hearing date has been established in this Docket and (iv) this Commission may allow additional time to Respondent. Given these facts, the relief sought in Happy Rabbit's Motion cannot be prejudicial to Alpine.

### **ALPINE CLAIMS ITS ADMISSIONS DO NOT GIVE RISE TO NEW CLAIM** **(Alpine's Section IV)**

Happy Rabbit agrees. Happy Rabbit's Motion to Conform to Proof involves a claim that was implicit in Happy Rabbit's original Complaint. The natural consequence of Happy Rabbit's Complaint was a return of monies overcharged by Alpine.



Alpine's admission to the October 6, 2003 communication by Happy Rabbit and Alpine's *de facto* acknowledgment that 58 other entities (landlords or owners) are "similarly situated" could not be anticipated when Happy Rabbit filed its initial Complaint. Alpine's admissions give Happy Rabbit a good faith basis to not only request a refund, but to allege a willful overcharge by Alpine in violation of R. 103-533 (3) S.C. Code Ann. (1976, as amended).

**ALPINE CLAIMS HAPPY RABBIT NOT "WILLFULLY OVERCHARGED"**  
**(Alpine's Section V)**

Alpine's reliance on an argument that Alpine's willful overcharge was sanctioned by the fact that the willful overcharges were made pursuant to a Commission approved schedule is inapposite.

Whenever the Commission shall find, after hearing, that the **rates...charges... however or whensoever they shall have theretofore been fixed or established, demanded,...charged or collected by any public utility for any service,...**that the rules,...affecting such rates...charges...are...or in anywise in violation of any provision of law, the Commission shall,...determine the just and reasonable... charges...or practices to be thereafter observed and enforced and [this Commission] **shall fix them by Order as herein provided** (emphasis supplied) § 58-5-290 S.C. Code Ann. (1976, as amended).

Therefore, in light of § 58-5-290, the fact that Alpine willfully overcharged Happy Rabbit pursuant to a Commission approved schedule does not absolve Alpine of the willful overcharge in light of § 27-33-50 S.C. Code Ann. (1976, as amended).

The obvious evidence for this Commission to consider for the willful overcharge is that (i) § 27-33-50 was effective on July 1, 2002, but not complied with by Alpine, (ii) Alpine has admitted that it received actual notice of § 27-33-50 on October 6, 2003, (iii) Alpine continued non-compliance with § 27-33-50 after constructive and actual notice and (iv) Alpine's *de facto* acknowledgment that 58 other entities (landlords or owners) are "similarly situated".

**ALPINE CLAIMS THE RELIEF WOULD RESULT IN A WINDFALL**  
**(Alpine's Section VI)**

Alpine can hardly be heard to complain that Alpine's refusal to comply with § 27-33-50, in recognition of this Commission's Regulation, R. 105-533 (3), since July 1, 2002, would lead to a result of which Alpine disapproves<sup>1</sup>.

**ALPINE CLAIMS THAT HAPPY RABBIT ACKNOWLEDGED ENTITLEMENT**  
**TO LESSER DAMAGES**  
**(Alpine's Section VII)**

Alpine's argument is a "red herring". As Alpine well knows, Happy Rabbit is limited to recovery of thirty-six month's damages in Circuit Court. Also, as Alpine well knows, no such time limitation applies in willful overcharge violations such as Alpine's violation of R. 105-533 (3), before this Commission. Additionally, Happy Rabbit can recover attorney's fees in the Circuit Court, but cannot recover attorney's fees before this Commission.

**ALPINE CLAIMS THAT THIS COMMISSION LACKS JURISDICTION**  
**(Alpine's Section VIII)**

It is uncontroverted that the Commission has exclusive jurisdiction to decide complaints from customers of a public utility, as to a willful overcharge. In order to adjudicate a complaint, the Commission may, and indeed must, take into consideration the General Laws of the State of South Carolina. In the context of this Complaint, the Commission must read the law, *in pari materia*.

Therefore, this Commission must hear the willful overcharge Complaint under R. 105-533 (3) *in pari materia* with § 27-33-50 S.C. Code Ann. (1976, as Amended). The fact that § 27-33-50 does not appear under Title 58 of the S.C. Code is not of any import, as to the Commission's authority to hear and decide willful overcharge Complaints under one of its Regulations. Whenever this Commission finds, after hearing, that the rates

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<sup>1</sup> To clarify Happy Rabbit's Motion to Conform to Proof, Carolyn L. Cook owned the Windridge Townhomes from October 6, 2003 until December 28, 2005 and has filed a separate complaint for that period of ownership. That means that Happy Rabbit's recovery should be from December 29, 2005 until the present.



charged and collected by a public utility are in anywise in violation of any provision of law, this Commission shall determine the just and reasonable rates to be charged by a public utility § 58-5-290 S.C. Code Ann. (1976, as amended). The State hereby asserts its rights to regulate the rates and services of every public utility § 58-5-210 S.C. Code Ann. (1976, as amended).

There is overwhelming statutory<sup>2</sup> (see *infra* note 1) and case law authority<sup>3</sup> (see cases cited *infra* note 2) for this Commission to decide a willful overcharge Complaint, in light of § 27-33-50 S.C. Code Ann. (1976, as amended). The following cases were relied upon by counsel for Alpine in their, “Motion for Summary Judgment”, filed with this Commission on March 31, 2009. Both cases cited by Alpine’s counsel contain similar language that the Commission **(i) not only has its express statutory authority from the General Assembly but, the Commission has power and jurisdiction, “...impliedly [conferred] by the General Assembly,”** (emphasis added) (see cases cited *infra* note 2) and **(ii) this Commission has powers conferred upon it, “...by reasonably necessary implication by the General Assembly.”** (emphasis added) (see cases cited *infra* note 2)

Both cases cited by counsel for Alpine acknowledge that this Commission not only has express authority conveyed upon it by the General Assembly of the State of South Carolina, but also has power and jurisdiction impliedly conferred by the General Assembly and powers conferred on it by reasonably necessary implication by the General Assembly. By Alpine’s counsel’s acknowledgment, this Commission has implied power and jurisdiction and reasonably necessary powers to hear willful overcharge Complaints established under one of its own Regulations, using a specific statute, not contained in Title 58 of the S.C. Code.

In addition, this Commission has express authority to hear a willful overcharge Complaint under R. 105-533 (3), using § 27-33-50.

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<sup>2</sup> Commission statutes which are applicable are § 58-3-140, § 58-5-10 (4), § 58-5-210, § 58-5-290, and § 58-5-300.

<sup>3</sup> See *Kiawah Property Owners Group v. Public Serv. Comm’n of S.C.*, 359 S.C. 105, 109, 597 S.E.2d 145, 147 (2004) (“The PSC is a government agency of limited power and jurisdiction, which is **conferred either expressly or impliedly by the General Assembly.**”) (emphasis added); *City of Camden v. Public Service Comm’n of S.C.*, 283 S.C. 380, 382, 323 S.E.2d 519, 521 (1984) (“The Public Service Commission is a governmental body of limited power and jurisdiction, and has only such powers as are **conferred upon it either expressly or by reasonably necessary implication by the General Assembly.**”) (emphasis added)

The statutory authority for the Commission to hear the case *sub judice* follows:  
Alpine by definition is a public utility regulated by this Commission § 58-5-10 S.C. Code Ann. (1976, as amended). This Commission has power and jurisdiction to supervise and regulate the rates and service of every public utility in this State to be furnished, imposed, or observed, and followed by every public utility in this State § 58-3-140 S.C. Code Ann. (1976, as amended). The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State,...and **the State hereby asserts its rights to regulate the rates and services of every “public utility” as herein defined** (emphasis supplied) § 58-5-210 S.C. Code Ann. (1976, as amended). Whenever the Commission shall find, after hearing, that the rates...charges...however or whensoever they shall have theretofore been fixed or established, demanded,...charged or collected by any public utility for any service,...that the rules,...affecting such rates...charges...are...**or in anywise in violation of any provision of law**, the Commission shall,...determine the just and reasonable... charges...or practices to be thereafter observed and enforced and [this Commission] shall fix them by order as herein provided (emphasis supplied) § 58-5-290 S.C. Code Ann. (1976, as amended). In connection with a determination under § 58-5-290 the Commission may consider all facts which in its judgment have a bearing upon a proper determination of the question, although not set forth in the application and not within the allegations contained therein § 58-5-300 S.C. Code Ann. (1976, as amended).

The authority cited above militates against the idea that this Commission cannot hear a willful overcharge Complaint, because a statute outside Title 58 has been violated by a public utility subject to the jurisdiction of this Commission. It is suggested that this Commission defer this Complaint to the Circuit Court, although that Court would not be able to decide and award the damages contemplated by the South Carolina General Assembly when it approved the Commissions Regulation, R. 105-533 (3) S.C. Code Ann. (1976, as amended). Based on the foregoing and the Pleadings, in this Docket, the relief sought in Happy Rabbit’s Motion should be granted.

[SIGNATURE PAGE FOLLOWS]

Reply to Respondents Response  
April 6, 2009  
Page 7 of 7

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
Richard L. Whitt  
Jefferson D. Griffith, III

Counsel of Record for Happy Rabbit,  
a South Carolina Limited Partnership  
on behalf of Windridge Townhomes

Columbia, South Carolina  
RLW/jjy

Enclosure



**BEFORE  
THE PUBLIC SERVICE COMMISSION  
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DOCKET NO. 2008-360-S**

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**CERTIFICATE OF SERVICE**

I, Jessica Yun, an employee of Austin & Rogers, P.A., certify that I mailed a copy of Happy Rabbit's Reply to Respondent's Response to Complainant's Motion to Conform in the above referenced matter as indicated below, via U.S. Mails as addressed below, with proper postage affixed thereto, or e-mail on April 6, 2009.

Attorney Benjamin P. Mustian  
P.O. Box 8416  
Columbia S.C., 29202-8416  
**Via U.S. Mail**

Nanette S. Edwards, Esquire  
**Via e-mail**

Austin & Rogers, P.A.

/S/  
Jessica Yun

Columbia, South Carolina  
April 6, 2009